

² The Board notes that following the December 4, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 25, 2005 appellant, then a 36-year-old heavy mobile equipment repairer, filed a traumatic injury claim (Form CA-1) alleging that on April 19, 2005 he injured his back when swinging a sledge hammer while in the performance of duty. He stopped work on April 21, 2005. Appellant returned to work on May 24, 2006, working four hours per day and gradually increased his time to work eight-hour days.

OWCP accepted the claim for sprain/strain lumbar region and lumbosacral spondylosis without myelopathy. It paid appellant wage-loss compensation on the supplemental rolls from June 14 until September 2, 2005 and on the periodic rolls for temporary total disability from September 4, 2005 to May 13, 2006. OWCP also paid appellant wage-loss compensation for partial disability on the supplemental rolls as of May 14 through October 18, 2006. Appellant returned to full-time modified-duty work on July 3, 2006.

On December 29, 2008 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing May 3, 2007. He alleged that he was never properly assigned modified work duties after his return to work. The record reflects that the employing establishment terminated appellant for cause on May 3, 2007.

By decision dated February 12, 2009, OWCP denied appellant's claim for a recurrence of disability beginning May 24, 2006 as the medical evidence was insufficient to support that he was temporarily totally disabled during the alleged period.

On March 13, 2009 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 23, 2009.

By decision dated October 21, 2009, an OWCP hearing representative affirmed OWCP's February 12, 2009 decision. The hearing representative found that there was no evidence that appellant was terminated from employment because of his physical inability to perform his assigned duties or that he stopped work due to his accepted condition. As appellant stopped work for reasons other than his accepted employment injury, he had no disability under FECA.

On October 27, 2010 appellant requested reconsideration of the October 21, 2009 decision.

By decision dated January 7, 2011, OWCP denied modification of the October 21, 2009 decision.

On September 9, 2020 appellant requested reconsideration. In his September 9, 2020 statement, he referenced a Board decision regarding wage-earning capacities and suitable work. Appellant alleged that the employing establishment never "re-engineered" his job, suitable work

was never provided and, as such, OWCP should reverse his prior denials and pay him compensation for disability.

In a September 21, 2020 report, Dr. John Steinmann, an osteopath specializing in orthopedic surgery, diagnosed low back pain, status post L4-5 fusion of lumbar spine and adjacent segment degeneration L3-4, and degeneration of lumbar or lumbosacral intervertebral disc. He opined that appellant's condition was permanent and stationary, per prior report. Dr. Steinmann opined that appellant's back pain was likely the result of degenerative disc disease that resulted in mechanical weakness of his lumbar spine and that it was not severe enough to warrant surgical intervention. He opined that appellant would require further medical care related to his adjacent segment degeneration, which stems from his L4-5 fusion.

By decision dated December 4, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁵ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (IFECS)).⁶ Imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.⁸ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review,

³ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2020).

⁶ *Id.* at Chapter 2.1602.4(b) (February 2016).

⁷ *See R.K.*, Docket No. 19-1477 (issued March 2, 2020); *R.L.*, Docket No. 18-0496 (issued January 9, 2019).

⁸ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's reconsideration request demonstrates clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁴

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence which on its face shows that OWCP made an error.¹⁶ Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁷ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed.

OWCP properly determined that appellant failed to file a timely request for reconsideration. A request for reconsideration must be received within one year of the date of the

⁹ *Id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹² *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁴ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁵ *See supra* note 5 at Chapter 2.1602.5(a) (February 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁶ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁷ *Id.*

¹⁸ *R.I.*, Docket No. 21-0090 (issued May 12, 2021); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

last merit decision for which review is sought.¹⁹ As appellant's request for reconsideration was not received by OWCP until September 9, 2020, more than one year after issuance of OWCP's January 7, 2011 merit decision, it was untimely filed.²⁰ Consequently, he must demonstrate clear evidence of error by OWCP in its December 4, 2020 decision.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP.

In his September 9, 2020 statement, appellant alleged that his job was never "re-engineered" and there was no evidence to support that suitable work was provided to him. He also referenced a Board decision regarding wage-earning capacity and suitable work and requested payment of compensation benefits. However, the issues of wage-earning capacity and suitable work are not relevant to the present claim. The underlying issue is whether appellant has established a recurrence of disability causally related to the accepted April 19, 2005 employment injury.²¹ Appellant's allegations on reconsideration do not address the underlying issue and are insufficient to establish clear evidence of error.

Appellant also submitted medical evidence from Dr. Steinmann pertaining to his back condition. However, this medical evidence is not relevant to the underlying issue of appellant's entitlement to wage-loss compensation due to the accepted employment injury during the claimed period, as Dr. Steinmann did not discuss appellant's disability status during the claimed period.²² To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion.²³ The term clear evidence of error is intended to represent a difficult standard.²⁴ Dr. Steinmann's report does not manifest on its face that OWCP committed an error in denying appellant's compensation claim or is of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, this evidence is insufficient to demonstrate clear evidence of error.

Consequently, OWCP properly found that appellant's September 9, 2020 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁹ See *supra* note 5.

²⁰ See *supra* note 5 at Chapter 2.1602.4a (February 2020).

²¹ *J.G.*, Docket No. 20-1471 (issued June 23, 2021); *John W. Normand*, 39 ECAB 1378 (1988).

²² *J.C.*, Docket No. 20-1250 (issued May 24, 2021).

²³ *Id.*, see *L.B.*, Docket No. 17-0760 (issued September 5, 2017).

²⁴ *J.C.*, *supra* note 22; see *James R. Mirra*, 56 ECAB 738 (2005).

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board